

**REPORT OF THE  
CALIFORNIA ATTORNEY GENERAL**



**SAN DIEGO CITY ATTORNEY MICHAEL AGUIRRE'S  
ALLEGATIONS OF "CORRUPTION" AGAINST  
SAN DIEGO MAYOR JERRY SANDERS REGARDING  
THE SUNROAD BUILDING PROJECT**

**MAY, 2008**

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3. **Letter of June 21, 2007 from Chief Assistant Attorney General Dane Gillette to Mayor Jerry Sanders**

4. Letter of June 22, 2007 from Senior Assistant Attorney General Gary W. Schons to San Diego City Attorney Michael Aguirre
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13. Scott Lewis, "Aguirre: Mayor's Corrupt," Voice of San Diego (June 7, 2007)

14. **DVD with Video Clips—Mayor’s Press Conference of May 18, 2007; KUSI Morning News with City Attorney Aguirre of May 23, June 6 and 13, 2007; Airport Authority Meeting of June 7, 2007 (audio only); City Attorney’s Press Conference of June 12, 2007**

# I.

## INTRODUCTION

The Attorney General agreed to a request by Jerry Sanders, the Mayor of the City of San Diego, to inquire into allegations of corrupt conduct made against the mayor by Michael Aguirre, the City Attorney of San Diego. This report is the product of our inquiry and evaluation of that matter.

The inquiry commenced shortly after June 15, 2007, when the San Diego Union-Tribune published City Attorney Aguirre's letter to the editor concerning the mayor's handling of the Sunroad Centrum 12 building project. In August 2006, the Federal Aviation Administration (FAA) had determined that the Centrum 12 building constituted an air navigation hazard due to its height and proximity to Montgomery Field Airport, which is owned and operated by the City of San Diego. Sunroad's principal and the owner of Centrum 12, Aaron Feldman, is a campaign contributor of the mayor's. City Attorney Aguirre's letter to the editor charged that Mayor Sanders "engaged in an embarrassing and corrupt course of action," by allowing Centrum 12's construction by Feldman "in defiance of FAA safety standards and California state law," and by employing his staff and a San Diego Regional Airport Authority executive on loan to the city to "lobby the FAA for changes to the routing of airplanes at Montgomery Field so that the illegal building could remain, [thus], misusing thousands of dollars of public funds for the private benefit of a campaign contributor," i.e., Feldman. City Attorney Aguirre additionally charged that the mayor had "engaged in a campaign of delay, deny and deceive."

This office inquired into City Attorney Aguirre's allegations of a "corrupt course of action" by the mayor, as well as his related allegations made earlier in two television news programs, an airport authority meeting and a press conference. Our inquiry examined not only the mayor's handling of the Sunroad Centrum 12 building project after the FAA's hazard determination, but the reasoning and motivation for the actions taken concerning the Centrum 12 project by the mayor, his closest advisors and other city executives, directors and managers. We also inquired into contacts about the project that the mayor and his advisors and managers had not only with Sunroad's representatives, including its attorneys, representatives and Feldman, but with the FAA, CalTrans, the City Attorney's Office, the Airport Authority, the press and the public.

As a result of that inquiry, we identified the relevant circumstances concerning the Centrum 12 building project that informed the actions by the mayor and his administration. After determining those material facts, we analyzed whether the mayor or his managerial subordinates undertook activities that constitute a "corrupt course of action" as alleged by the city attorney and whether those activities otherwise violated the law. From our inquiry and evaluation, we conclude that the record does not support the allegations made by the city attorney against the mayor.

## II. THE ATTORNEY GENERAL'S AGREEMENT TO THE MAYOR'S REQUEST FOR AN INQUIRY AND COMMUNICATIONS WITH THE CITY ATTORNEY

On June 20, 2007, Mayor Jerry Sanders requested that the Attorney General conduct an inquiry and evaluation of allegations of corruption made against the mayor five days before by San Diego City Attorney Michael Aguirre in a letter to the editor published in the San Diego Union-Tribune. Attachment 2. On June 21, 2007, this office informed Mayor Sanders that the Attorney General agreed to investigate the city attorney's allegations of corruption in light of their serious nature and the importance of maintaining public confidence in its elected officials. Attachment 3.

By letter of June 22, 2007, the Attorney General's Office informed City Attorney Aguirre of the Attorney General's agreement to the mayor's request and the Attorney General's reasons for that decision. In our letter, we requested that the city attorney inform this office of his specific charges against the mayor and that he specify what public corruption formed the basis of the allegations made in his letter to the editor and any other allegations of corruption he might have concerning the mayor. In that regard, we provided the city attorney with the Attorney General's understanding of the legal term "corruption" in the context of this matter. Additionally, this office asked him to provide the materials, documents, names of witnesses and sources of information tending to substantiate his allegations of corruption. We informed City Attorney Aguirre that after receiving his response, this office would review those materials and arrange to meet with the city attorney and his staff. Attachment 4. There was no response to our letter.

On July 12, 2007, this office sent another letter to City Attorney Aguirre, requesting that he respond to our June 22 letter. Alternatively, we invited the city attorney to indicate either that he intended to make no response in the matter, or that he was withdrawing his charges of corruption against the mayor. Attachment 5. Again, this office received no response to the letter.

### III.

## THE SCOPE OF INQUIRY AND THE SOURCES OF INFORMATION

Our inquiry and evaluation centered on the allegations of corruption made by City Attorney Aguirre in his letter to the San Diego Union-Tribune editor. The inquiry extended to similar and related allegations made by him during local television news programs on May 23 and June 6, 2007, an Airport Authority meeting on June 7, 2007, and a press conference on June 12, 2007. We considered these interrelated charges cumulatively insofar as they were summarized or reflected in the Union-Tribune letter to the editor. Our intention was to ascertain all the facts relevant to the city attorney's allegation that the mayor had engaged in a "corrupt course of action."

The city attorney's decision not to specify his charges against the mayor or to identify the nature of the corruption alleged as requested by this office had two consequences for our inquiry and evaluation. First, we conducted the inquiry keeping in view the specific context in which the city attorney's charges were made and the degree to which the charges were supported by verifiable facts and sources of information. The context in which the charges had appeared and the extent to which the source information supported them bore on their substance.

Second, we evaluated the facts employing the legal standard outlined in our June 22, 2007 letter to the city attorney. The Attorney General understands the word "corruption" in the present context to include illegal acts, such as bribery (Pen. Code, § 67 et seq.); conflict of interest (Gov. Code, §§ 1090, 1125 et seq., 87100 et seq.); misuse of government funds (Pen. Code § 424 et seq.); a breach of applicable city ordinances on ethics; any act or course of conduct that would constitute "a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act, or omission referred to, or to some other person" ("corruptly," as defined in Pen. Code, § 7, subd. (3)); or any course of action to cover-up or deceive so as to prevent discovery of the allegedly corrupt acts by competent officials or the public. This is an accurate and reasonably comprehensive legal definition of the term "corruption." As such, it is one that properly may be applied to the public statements of City Attorney Aguirre, a lawyer and a prosecutor with executive responsibility for the city's legal affairs.

The breadth of the city attorney's allegations led us to consider the entire background of events leading up to and surrounding the construction of the Centrum 12 building. The events that preceded the city attorney's allegations have been documented in reports by the city attorney (Interim Report No.17, Special Report to the City Council Regarding Sunroad Centrum 12 and Sunroad Residential Development, issued May 15, 2007), the mayor's office (Investigation Concerning the Sunroad Centrum 12 Building, issued July 19, 2007), and the press. Relevant events are also recounted in pleadings filed in the pending litigation between the city and Sunroad. We considered all these sources. The reports and pleadings largely recount factual matters based on interviews or depositions, correspondence, letters, e-mails, filings and other city and governmental records. We

reviewed the primary source materials for those reports and obtained hundreds of similar primary source materials. These included e-mails from city employees, interview reports from the mayor's office's investigation, and releases from both the mayor's and the city attorney's offices. We reviewed the transcript of the hearing on the motion to disqualify the city attorney's office in the criminal case of *People v. Thomas Story*, San Diego Superior Court No. M014519. We reviewed reports of campaign contributions received by Mayor Sanders and San Diegans for City Hall Reform, a measure backed by the mayor. We also obtained and reviewed pertinent video from the electronic media and press conferences conducted by the mayor and the city attorney. Attachment 14.

In addition, we obtained the Report of Investigation Prepared for Independent Members of the San Diego County Regional Airport Authority Board, a report authored by counsel for the Regional Airport Authority. That report followed in the wake of a "criminal investigation" launched by the city attorney in June 2007 regarding his allegations that Airport Authority members and staff conspired to misuse public funds and violated the Brown Act open meeting law. The Airport Authority, which provided its counsel's report to the Attorney General's Office in October 2007 to assist in our investigation, has authorized this office to release that report here. Attachment 6. Events recounted in that report that are discussed herein are adopted as part of our factual findings.

We also interviewed Mayor Sanders; Fred Sainz, the mayor's Director of Communications and Press Secretary; Jim Waring, the Deputy Chief Operating Officer for Land Use and Economic Development during the relevant time period; and Marcela Escobar-Eck, the Director of the Department of Development Services from October 2006 through August 2007. As of October 2006, Waring and Escobar-Eck were the two city officials reporting to the mayor with responsibility for matters arising from the Centrum 12 building project. Our interviews with those individuals focused primarily on the motivations and reasons for their actions with respect to the handling of Sunroad and the Centrum 12 building in light of the FAA's hazard determination.

From these and other related sources, this office prepared a Comprehensive Time Line of Events. Attachment 1. By and large, the events listed in the time line and the relevance of those events to this office's inquiry and evaluation are not reasonably subject to dispute. It is included in this report and constitutes part of our factual findings. The time line supplements and supports the factual narrative in the Findings (Section IV).

It should be clear from the scope of our inquiry and the legal standard employed in evaluating the facts that we did not judge the public benefit or the practical utility of the various actions by the mayor, subordinate city officials and employees, the city attorney and his office, the Airport Authority, Sunroad and its representatives, the Federal Aviation Administration, the California Department of Transportation, or any other entity or party with respect to the Centrum 12 building project. Nor did we undertake an administrative performance review like the one in a July 2007 report by the mayor's office, which criticized various judgments, decisions, actions and lapses of city officials respecting the Centrum 12 building project.

Similarly, we have not made any public policy judgments concerning the mayor's strategies or course of action in dealing with Sunroad, the FAA or CalTrans concerning the Centrum 12 project. In particular, we did not assess the merits or the likely outcome of the pending litigation arising from the Centrum 12 project. Sometime ago, the FAA determined that Centrum 12 no longer posed a hazard to air navigation after the building was deconstructed to 160-foot height. But the City of San Diego faces significant ongoing legal expenses defending against Sunroad's pending cross-claim for million-dollar damages concerning the Sunroad Centrum project. (*People of the State of California and the City of San Diego v. Sunroad Centrum L.P., et al.*, San Diego Superior Court No. GIC 877054.)

Our evaluation focused on whether the strategy and the course of action pursued by the mayor and his subordinates were lawful, had a legitimate basis in reason, and were pursued in good faith for the public interest. Because intent and motive are crucial in determining if public corruption occurred under the applicable legal standard, our investigation included an evaluation of the good or bad faith of the mayor and his subordinate staff who dealt with Sunroad and the Centrum 12 project.

## IV.

### FINDINGS: FACTUAL BACKGROUND

#### A. THE PERMITTING AND CONSTRUCTION OF THE CENTRUM 12 BUILDING AND EFFORTS TO ADDRESS THE FAA HAZARD DETERMINATION

##### 1. From the New Century Master Plan to Permits for the Centrum 12 Building

In 1997, the San Diego Planning Commission and the San Diego City Council approved a Master Plan and a development agreement with General Dynamics for the New Century Project. The project concerned the development of the site of General Dynamics's former manufacturing plant on Kearny Mesa near Montgomery Field. When approved, the Master Plan had no building height limitations because of the property's zoning designation. The approval of the Master Plan was prefaced with an Environmental Impact Report (EIR). The Master Plan, the development agreement, and the EIR were provided to the California Department of Transportation (CalTrans). CalTrans did not provide a response or interpose objections to the New Century Project.

In 1998, General Dynamics sold the project to LRN Kearny Mesa, Inc. (Lennar Partners). In November 2000, Sunroad 4025 Partners L.P. (Sunroad) purchased the property from Lennar. Just before Sunroad's purchase, the City Council approved a zoning code update, which added a 45-foot height limitation to the commercial zone within the building site. In 2002, an amended development agreement with Sunroad, the last amendment to the Master Plan, was processed through public hearings. The resulting zoning designation resulted in no height restrictions in the new zone.

In 2005, when the Development Services Department reviewed Sunroad's proposal for the 180-foot-tall Centrum 12 building, a permit planner noted the potential conflict between the 45-foot height limit in the 1998 zoning update and the building's proposed height. The planner determined that the original Master Plan superseded the subsequent zoning change, giving Sunroad a vested right to the prior, no-height-limitation zoning designation. The planner was unaware of airspace regulations of the Federal Aviation Administration (FAA).

At the time, city planners had not implemented the October 2004 tentative Airport Land Use Compatibility Plan (ALCUP) promulgated by the Airport Authority. Had ALCUP been implemented, compliance with Federal Aviation Act regulations under 14 C.F.R. Part 77—Object Affecting Navigable Airspace—would have been part of the planning and approval process for the Sunroad Centrum 12 project. Furthermore, the City Council had not adopted or incorporated the FAA Part 77 regulations into the building review and approval process provided in the San Diego Municipal Code. Also, the Centrum 12 building site was outside the then-existing Montgomery Field Airport Influence Area (AIA).

On September 16, 2005, Sunroad submitted the building permit application for the Centrum 12 building project, with a proposed height of 180 feet. The application was complete as of September 30, 2005.

Mayor Sanders was sworn in on December 5, 2005. Jim Waring became the mayor's Deputy Chief Operating Officer for Land Use and Economic Development on January 23, 2006. Waring had responsibility for the city's Real Estate Assets, Development Services, Planning, Economic Development and Redevelopment Agency departments (CCDC and SEDC) and for some 750 employees within those departments.

In February 2006, the city completed its Substantial Conformance Review for Centrum 12. Building permits were issued for the Centrum 12 building on February 7, 2006 (building structure) and February 24 (trenching and excavation). Sunroad began construction on March 6, 2006.

## **2. The FAA Hazard Determination and the City's and Sunroad's Responses**

The proposed height of the Centrum 12 building became an issue on April 3, 2006. On that date, the FAA, apparently having been alerted by an anonymous letter, advised Sunroad that it must file for an aeronautical study pursuant to its 14 C.F.R. Part 77 regulations because of the building's height and proximity to Montgomery Field.

Sunroad immediately notified personnel in the city's Development Services Department (DSD) of the FAA's "presumed hazard" finding respecting Centrum 12. A DSD project manager directed that the matter be studied, but apparently there was little follow-up on the directive within DSD. Sunroad applied to the FAA for approval to build to 180 feet. However, the FAA denied that request and issued a Notice of Presumed Hazard on April 24, 2006.

Nearly two months later on June 19, 2006, top management in DSD learned of the problem when the FAA alerted them of the action. The next day, June 20, the FAA advised Sunroad and, by copy, DSD managers, that it would issue a Determination of Hazard in 60 days absent changes to the building's plans. Sunroad immediately informed the FAA and DSD that it would halt construction at 160 feet (a height within the FAA's Part 77 standards) while it studied the problem. Sunroad also filed an aeronautical study request with the FAA advising it that the building would be 160 feet. On June 23, DSD managers requested their legal adviser, Deputy City Attorney David Miller, to research the issue and to provide a legal opinion. On June 27, the FAA issued a determination of no hazard for the building at the 160-foot height. When so advised, DSD senior management copied the information by e-mail on June 29 to Jim Waring, his first notification having to do with the Centrum 12 building. On July 7, 2006, Centrum 12 construction had reached an 82-foot height, and the city issued its final building permit for the project, which was for the interior construction.

On July 26, 2006, Sunroad's counsel advised the city and the FAA that it intended to build Centrum 12 to 180 feet pursuant to its permit. Indeed, Sunroad advised that construction had reached 180 feet. Within that same week, Gary Halbert, the Director of DSD, contacted DCA Miller

and learned that the previously requested legal research on building Centrum 12 to 180 feet had not been completed in light of the issuance of the city's permit and the FAA's no hazard determination. (DCA Miller apparently had not pursued researching the matter after Sunroad indicated in June that it would not build above 160 feet.) On August 7, 2006, DCA Miller advised DSD managers that the city could legally order a halt to construction under a nuisance theory. The next day, August 8, the building was topped out at 180 feet. On August 11, DSD managers and DCA Miller met with Sunroad representatives and its counsel to discuss air space issues with respect to the Centrum 12 building and two other buildings that Sunroad planned to construct in the area. A similar meeting took place on September 5, 2006.

### **3. The Reaction to Sunroad's Decision to Build to 180 Feet**

On September 14, 2006, CalTrans became a party to the controversy by advising Sunroad, DSD and the city attorney's office, that the building violated state law because it required a state permit in light of the FAA Part 77 height issues. Sunroad immediately objected to CalTrans's position, but thereafter applied to CalTrans for a state permit.

On October 4, 2006, Marcela Escobar-Eck became Director of DSD, filling the vacancy left by the retirement of Gary Halbert, who had departed in August. (Halbert's departure was unrelated to the Sunroad project.)

On October 12, Mike Tussey, the city's Deputy Director of Airports, advised Jim Barwick, Director of Real Estate Assets, and Jim Waring, that the Airport Advisory Committee had voted the previous day to advise Mayor Sanders to support CalTrans in withholding a permit for the Centrum 12 building to stand at 180 feet. This was Waring's first notice of a problem with the Centrum 12 building. Waring began advising the mayor about the issue soon afterward. Mayor Sander's initial direction to Waring was to be certain that no Sunroad-proposed buildings in the project area were approved or permitted without compliance with FAA regulations.

On October 16 and 19, 2006, DCA Miller advised Waring in writing that Centrum 12 was illegal and a nuisance, that the city had a duty to seek abatement, and that it should issue a Stop Work Order (SWO). Because no legal analysis had been made concerning either the city's possible liability if an SWO issued or the effect of the FAA's hazard determination, Waring had no confidence in that advice. Approximately a week later, on October 25, DCA Carmen Brock sent an e-mail to Waring and Escobar-Eck questioning why an SWO had not issued. The same day, an e-mail exchange of some importance occurred between Waring and DCA Miller, which was copied to Escobar-Eck, other DSD managers and other attorneys in the city attorney's office, including Assistant City Attorney Karen Huemann. In that e-mail exchange, DCA Miller stated that Sunroad needed a permit from CalTrans and a no hazard determination from the FAA and that in the meantime, the city should issue an SWO.

Waring responded with an outline of what became his and the mayor's strategy for the next seven to eight months in dealing with Sunroad and the Centrum 12 building in light of the concerns expressed by the FAA and CalTrans:

First of all I want to say no one at DSD is an advocate for Sunroad. The appropriate process needs to be followed and we support that effort. What is hard here is that CalTrans was given the notices required by law as part of the project review. They did not respond. ¶ A permit was issued that followed all of our city's rules and regulations. ¶ Now with the owner having spent millions of dollars someone raises an issue of height— putting the City of San Diego in the middle of a problem we did not create and exposing the owner to millions of dollars in damages. Who is a[t] fault here? What are the rules when an agency with notice does not respond or express concern and our city and a private party relies on the process? What would be the position if the FAA first raised this issue after the building is opened and occupied? The same? Is there a difference when it is topped out? ¶ DSD will follow the orders from your office. We want a specific instruction to issue the stop order you want and your assurance of the city's legal position on liability. Clearly a lawsuit will follow, which of course cannot drive our policy decisions. ¶ But why not have the state DOT [CalTrans] go to court and seek the order? ¶ We could as a city then follow it. In other words for the city of San Diego aren't we better served following a court order than responding to an administrative request from an agency that already missed the proper time to become involved? If the law and rights are so clear it should be easy for the state to get such an order. Certainly helps our city. ¶ As for talking to the owner, I respectfully suggest that as government and regulators it is always helpful and important to speak directly with impacted parties to clear the air, identify areas of agreement and disagreement and hopefully design an acceptable and non-adversarial approach to a solution.

#### **4. The Stop Work Order and "Weatherization" Proposal**

On October 27, 2006, Waring responded to an e-mail from CalTrans stating that the building was illegal. Waring asked if CalTrans was seeking an SWO and would assume liability if the city issued it. Waring copied the e-mail to DCA Miller and Escobar-Eck. Nonetheless, that day, the city (DSD) issued an SWO to Sunroad. The order to stop work encompassed Centrum 12's top two floors with a height of 17 feet, which was later modified to the top 20 feet. Waring's view was that the SWO was essentially meaningless and did not subject the city to any liability because the building was already at 180 feet and no work was being done on the top two floors of the building at that time.

On November 21, 2006, Sunroad representative Tom Story wrote to the city's Chief Inspector for permission to work on Centrum 12's top 20 feet in order to seal the building and to prevent weather damage to the lower floors. The following week, city land use and city attorney representatives met with Sunroad representatives to discuss this so-called "weatherization" proposal. On December 1, City Attorney Aguirre personally sent a memo to Waring advising him not to change the SWO, i.e., not to allow the "weatherization" measures. On December 4, Waring

responded by e-mail to Escobar-Eck and DCA Miller, stating that with respect to Sunroad's "weatherization" proposal, he was attempting to minimize the city's liability and prevent a lawsuit. Waring also restated his view that the FAA or CalTrans should commence litigation to enforce their rules, adding, "I want us to remain spectators, not actors, in this." DCA Brock immediately responded that the city attorney had directed that no changes were to be made to the SWO and that the city attorney was working with CalTrans to "abate the nuisance."

**5. "Separate Strategies"—The City Attorney Files Suit to Bring the Building Down to 160 Feet While Waring Attempts a Resolution and Approves the "Weatherization" Measures**

On December 15, 2006, the city attorney filed a civil nuisance action against Sunroad, seeking to have the building lowered to no more than 160 feet. The same day, Waring e-mailed City Attorney Aguirre, with copies to DSD managers, the mayor's closest advisors and Ronne Froman, the city's Chief of Operations. Waring told the city attorney that he shared the latter's concern for public safety, but did not "understand the tactics you are taking toward the Sunroad project," adding that there was a solution (proposed by Sunroad's counsel in a letter on December 1) "that can be reached consistent with FAA standards and the interest of the aviation community." Waring pledged DSD's cooperation with the city attorney, but asked in reference to the city attorney's repeated demands for DSD documents and employee interviews that those demands be coordinated through senior management. Waring closed by asking the city attorney to contact him directly for the facts concerning Sunroad "and the current plan to try and resolve the currently unacceptable situation."

The city attorney did not respond to Waring's e-mail and adhered to a strategy to bring the building down to 160 feet via the lawsuit. Eventually, the city attorney brought criminal investigation and prosecution pressures, or the threat thereof, to bear on Sunroad and on those city officials whom he viewed as working with Sunroad toward a solution other than the "160 foot solution."

On the other hand, without additional notice to or consultation with the city attorney, Waring pursued an apparent strategy of trying to resolve concerns about Centrum 12 by the FAA and CalTrans, while seeking to minimize the city's potential liability from suit by Sunroad in the event that deconstruction to 160 feet or other significant alterations to the building were imposed or required. In the days following December 15, 2006, Escobar-Eck consulted at Waring's direction with city building officials and inspectors regarding Sunroad's "weatherization" proposal, without further consultation or input from the city attorney's office. The Chief Inspector advised Escobar-Eck that the proposals were reasonable and necessary to protect the building's lower floors.

At this time, Sunroad principal Aaron Feldman was in contact with Waring and requested a meeting with the Mayor Sanders to work out a solution in the wake of the city attorney's lawsuit. The mayor agreed to a meeting on December 19 in his office, where Feldman and an aide, Tom Story, met with Mayor Sanders and Waring. At the meeting, Feldman told the mayor that the city attorney's suit could result in millions of dollars of losses to Sunroad and that he would be forced to countersue the city to protect Sunroad's interests, a measure he said he did not want to take.

Feldman said his lawyer had told him that if the mayor wrote the FAA asking that agency to make permanent the then-existing Notice to Airman (NOTAM), which had altered the inclement weather approach pattern at Montgomery Field to accommodate the 330-foot construction crane for the building, it would solve the FAA's concerns and end the litigation. The mayor made no commitment to Feldman and ultimately refused to take that action. The "weatherization" proposal under consideration by Waring and Escobar-Eck at the time was not discussed at the meeting.

On December 21, 2006, Escobar-Eck sent Sunroad a letter. It modified the October 27 SWO to allow Sunroad to take the "weatherization" measures on the top 20 feet of the building. The permission was conditioned on Sunroad proceeding at its own risk and without any claim against the city. Waring and Escobar-Eck were motivated, Waring later stated, by the concern that a possible consequence of the litigation was "one day, the city could own that building," and thus the two aimed to minimize the city's liability and damage to the remainder of the building. On January 19, 2007, CalTrans wrote to Waring that the city's failure to enforce the original SWO, i.e., by issuing the December 21 letter allowing the "weatherization" measures, allowed construction that violated state law. Waring responded on January 23, 2007 that Centrum 12 was not in the AIA, the building was already at 180 feet, the SWO modification would not change that fact, and the city could not order the building lowered in light of the city attorney's lawsuit.

#### **6. The City Attorney Pursues Criminal Investigation and Prosecution of Sunroad and City Officials**

City Attorney Aguirre conducted a press conference at the site of the building on January 23, 2007. He announced that he was asking the United States Attorney to open a criminal investigation into the construction of the Centrum 12 building, and suggested that both Sunroad executives and city officials should be targets of the federal probe and "an aggressive prosecution." The United States Attorney apparently never acted on the city attorney's call for a federal criminal probe and prosecution.

On January 30, 2007, DCA Kimberly Urie sent a letter to Aaron Feldman giving notice to Sunroad of a criminal nuisance (Pen. Code, § 373, subd. (a)) with respect to Centrum 12. In February 2007, Sunroad filed a cross-claim in the city attorney's nuisance action, seeking \$40 million in damages from the city for inverse condemnation of the building. On March 21, 2007, the city attorney obtained a warrant to search Sunroad's offices in an investigation of Tom Story, a Sunroad executive and ex-chief of staff for former Mayor Dick Murphy, and of others unnamed—presumably city officials in DSD—for conspiracy to violate San Diego Municipal Code provisions regarding lobbying activities by former city officials. On March 29, after the San Diego Police Department and other law enforcement agencies had refused to serve the search warrant, the issuing superior court judge ordered the warrant and the supporting affidavit unsealed. On April 3, 2007, the city attorney nevertheless filed misdemeanor charges against Story for violation of the city's lobbying ordinances. On May 8, 2007, a superior court judge ordered the city attorney and his office recused from the Story prosecution based on a finding, among others, that the city attorney had personally attempted to use the criminal process to advance the civil case against Sunroad.

## **7. Waring's and Sunroad's Efforts to Meet the FAA Hazard Concerns and Minimize Sunroad's Losses and Any City Liability**

From February through May 2007, Waring pressed the effort to satisfy the FAA's safety concerns prompting its hazard determination and to minimize the costs to Sunroad in order to lessen or eliminate any financial liability by the city. This effort had begun in early December 2006, when Sunroad's counsel first proposed an operational resolution to the FAA's concerns and Waring had DSD staff study the proposal. In addition, on February 15, 2007, Waring, Ronne Froman, and Mike Tussey met with CalTrans officials Jeff Brown and Pedro Orso Delgado to discuss airport issues, including Sunroad, and to "clear the air" with CalTrans over the city's position.

On April 25, 2007, Feldman wrote to Waring with an offer to dismiss the Sunroad litigation against the city as consideration for the city's dismissing its nuisance action and assisting Sunroad in obtaining a lifting of the FAA's hazard determination. Feldman offered to lower the building by 18 feet by removing the "wing" element of the building, in an effort to comply with FAA Part 77 requirements, and to fund an instrument approach for one of the Montgomery Field runways. Apparently, however, the proposal was rejected by the FAA as inadequate to meet its safety concerns.

In early May 2007, Sunroad's counsel, Steve Strauss, called Waring to propose a second solution. That solution called for lowering the building to 166 feet 3 inches to address the FAA hazard determination, releasing the city from all liability, and securing a dismissal of the city-Sunroad litigation.

## **8. Mayor Sanders Authorizes a City Presentation to the FAA to Address the FAA's Hazard Concerns and Supports the City Attorney's Lawsuit**

About the same time that Strauss proposed the second solution to Waring in early May 2007, City Attorney Aguirre, according to Mayor Sanders, asked that the mayor attempt to settle the Centrum 12 building controversy, saying "We want to be seen as problem solvers." The mayor subsequently met with Jim Barwick, Director of Real Estate Assets, and Ted Sexton, an executive on loan from the Airport Authority to work on the city's airport issues. (See Part IV.B.) The meeting was held to discuss a possible solution for Centrum 12 to be presented to the FAA. Sexton and Barwick had been in contact with the FAA and discussed a proposal to solve the building's height problem. That proposal would have entailed changing the bad weather western approach from circling north near the Centrum 12 building to circling south—a route already approved by the FAA. After meeting with the mayor, Barwick and Sexton contacted Bruce Laird at the FAA. Laird agreed to meet with them to discuss the city's version of Strauss's proposal.

On May 18, 2007, the mayor held a press conference with City Attorney Aguirre. The mayor made these points:

- FAA and CalTrans had determined that the Centrum 12 building was a hazard at 180 feet and Sunroad had built to that height in defiance

of the applicable regulations and statutes.

- DSD and the city attorney failed to respond in a timely fashion to the concerns of the FAA and CalTrans and the mayor personally accepted responsibility for these failures and admitted that mistakes were made.
- The mayor stated his support for the city attorney's lawsuit to lower the building to 160 feet.
- The mayor was directing DSD to inform Sunroad that the city was requiring strict observance of the October 27 SWO, meaning no work on the top 20 feet of the building.
- The mayor had directed Chief Operating Officer Froman to investigate the permitting process for the Centrum 12 building and to recommend reforms.
- The mayor was sending a letter to the FAA and CalTrans regarding a proposal being discussed with the FAA to address the FAA's safety concerns/hazard determination regarding the building.

#### Attachment 7.

That same day, May 18, Mayor Sanders sent a letter to the FAA and CalTrans which made these representations:

- The mayor took responsibility for the city's failure to stop Sunroad from building to 180 feet.
- The mayor outlined a proposal previously discussed with the FAA to (1) reduce the height of the building to 163 feet with the exception of the mechanical equipment enclosure, comprising 15 percent of the overall roof line, which would reach 180 feet; (2) work with the FAA to discontinue circling instrument approaches north of the field and allow aircraft to circle south; (3) modify visual course rules to ensure aircraft remain clear of the building; and (4) work with Sunroad and the FAA to fund and install a straight-in instrument approach procedure to one of the runways.
- The mayor advised that (1) the October 27 SWO was being reinstated; (2) he was supporting the city attorney's lawsuit; and (3) he was directing an investigation into the city's response to building at 180 feet.

According to the mayor's aide, Fred Sainz, just before the press conference, the mayor's letter to the FAA and CalTrans was provided to City Attorney Aguirre. He read it and remarked that "this is great." The mayor directed copies of the May 18 letter be sent to the City Council, the city attorney, Ronne Froman, Waring, Escobar-Eck and Barwick. Attachment 8.

In the following days, Sexton communicated with Sunroad representatives to refine a presentation to the FAA. That presentation detailed the city's proposal as outlined in the mayor's May 18 letter. On May 22, Barwick and Sexton traveled to Fort Worth, Texas to present the city's proposal to FAA staff, including Kevin Haggerty, an official from Washington, D.C. Barwick and Sexton believed the proposal was well received. However, the FAA responded that it would not support any intrusion above 160 feet unless the airspace around the Centrum 12 building was totally cleared. That would require the city to institute an exclusive bad weather landing pattern that would take aircraft south of the field.

On May 31, 2007, Mayor Sanders met with Sexton, Barwick, and Waring, his senior advisers Kris Michell and Fred Sainz, and Alan Bersin, Chairman of the Airport Authority. The mayor decided that he could not endorse the flight path changes proposed by the FAA to clear the airspace over the Centrum 12 building. He later explained in a memo to the City Council on June 11 that the exclusive bad weather landing pattern would increase air traffic over the residential area of Serra Mesa, unfairly burdening its residents, and undermining the city's lawsuit against Sunroad. The mayor decided that the only solution was reduction of the building's height to 160 feet.

On June 18, 2007, City Attorney Aguirre wrote Kevin Haggerty at the FAA, advising him that the city was not requesting the FAA to modify its August 2006 hazard determination. Soon after, Haggerty advised Waring that the FAA did not intend to change that determination.

#### **9. The City Orders All Construction Halted and Sunroad Agrees to Reduce the Centrum 12 Building to 160 Feet**

On June 19, 2007, the city attorney sent a memo to the mayor and the City Council requesting that the mayor issue an SWO for all work on the Centrum 12 building. Mayor Sanders responded that he wanted advice on the legal implications of a total SWO and that he was requesting advice from outside counsel, Latham & Watkins. On June 20, the city attorney in another memo to the mayor and City Council stated that the building violated state law and requested that the mayor order the building reduced to 160 feet.

On June 21, 2007, after receiving advice of outside counsel, the mayor directed the issuance of a total SWO, halting all construction on the building, and issued a statement that he would work to require Sunroad to reduce the building to 160 feet. A Mitigation and Restoration Order was sent by Escobar-Eck to Sunroad directing that the building be reduced to 160 feet. On June 26, Sunroad agreed to lower the building to a height acceptable to the FAA. Deconstruction began in September 2007. On November 19, 2007, the FAA advised Sunroad that the Centrum 12 building no longer posed a hazard to air navigation.

**B. THE LOAN OF EXECUTIVE TED SEXTON FROM THE AIRPORT AUTHORITY TO THE CITY, SEXTON'S WORK ON THE CENTRUM 12 BUILDING AND OTHER ISSUES, AND THE MAYOR'S STATEMENTS REGARDING SEXTON'S ROLE AND WORK**

**1. The Early Sanders Administration Questions the City's Involvement in the Airport Business and Initiates a Discussion with the Regional Airport Authority**

Early in Mayor Sanders's administration, senior staff discussed whether the city should remain in the "airport business" considering the city's financial difficulties and requisite core functions. Part of the discussion touched on possibly obtaining a "loaned executive" from the Airport Authority (AA) to provide expert advice and guidance similar to agreements the city reached with the county and the port district. The AA had a legal mandate under the Public Utilities Code to assist local governments in ensuring compatible land uses in the vicinity of existing airports and was frustrated by a historical lack of coordination with the city relating to land use decisions surrounding city airports. The FAA itself had advised the AA that it was not satisfied with the city's performance in the operation of Brown and Montgomery Fields.

In March 2006, before the Centrum 12 building issue arose, Ronne Froman attended a meeting with the AA to discuss the city's position with respect to the airports. On June 7, Mayor Sanders wrote the AA with reference to prior discussions between the city and the airport authority and proposed that AA assume control of Brown and Montgomery Fields. In August, the AA agreed to explore the mayor's proposal and suggested bringing in the FAA to assist in discussions of regulatory considerations under such an arrangement. The AA conducted a study and circulated a report internally.

Late in 2006, the city and the AA held preliminary talks about lending the city an AA executive, along the lines of the executive loan made by the port to the city. On December 13, 2006, Ronne Froman and city staff members met with AA Executive Director Thella Brown and AA executive Ted Sexton about the Brown and Montgomery Fields proposal. At the meeting, the city suggested a "lease agreement" for the two airports placing them under the AA's control. The Sunroad building issue possibly was mentioned at the meeting as an example of the need for better coordination between the city and the AA. That same December, Alan Bersin became Chairman of the AA and might have had discussions with Mayor Sanders in which the mayor asked for the AA's assistance with the Sunroad building issue. In January, 2007, the mayor informally asked Bersin for assistance, including a "loaned executive."

On February 2, 2007, Thella Bowens sent Waring an e-mail proposing a meeting between the city and the AA staff and two AA board members to discuss how the city and the AA could work better together. The meeting held on February 12 included AA staff members Bowens, Sexton, and Shafer-Payne; AA board members Bersin and Watkins; and city staff members Waring, Anderson, and Escobar-Eck. Coordination issues and the "loaned executive" proposal were discussed. Thereafter, the "loaned executive" proposal was studied within the AA in the context of the agency's duty to assist local agencies on airport land use matters, rather than in relation to the Sunroad issue.

## **2. Mayor Sanders Requests the AA's Assistance with the Sunroad Building Issue**

On March 2, 2007, Mayor Sanders signed a letter drafted by Waring to Alan Bersin referencing only the Sunroad building issue and requesting assistance from the AA. The letter stated:

The City of San Diego is involved in litigation regarding a building constructed by Sunroad Enterprises near Montgomery Field. The building is already constructed to its maximum height, although interior improvements are not complete.

As mayor, my primary concern is with the safe operation of all city facilities, including our airports. For a number of reasons, my office has unfortunately been unable to get a clear analysis of whether or not the building is a safety risk to aviation, and, if so, whether there may be changes to operations and notices that would eliminate that risk. While the lawyers say the lawsuit will result in the building being lowered, the outcome of any lawsuit is never certain, and will take many months to determine. Furthermore, the taxpayers of San Diego face an unknown level of potential liability if the building owner is required to lower the structure.

I would appreciate and am requesting that the Airport Authority assist us in analyzing the situation and in working with the FAA and other interested stakeholders in an attempt to resolve the issue. Given the Authority's staff experience in aviation and FAA matters, your help would be invaluable in providing my office with clear and dispassionate guidance and advice.

Please let me know if the Authority will help with this important effort.

The letter made no explicit reference to a "loaned executive."

On March 12, 2007, after consulting with the AA's legal department, AA Chairman Alan Bersin wrote the mayor in response:

Thank you for your letter dated March 2, 2007 in which you request assistance from the San Diego Regional Airport Authority to help resolve issues surrounding the Sunroad Enterprises building near Montgomery Field.

In our role of addressing long-term transportation needs of the region, Airport Authority staff is already working with City of San Diego staff to identify the best approaches for achieving the highest use of air transportation infrastructure in the region. We believe it is in everyone's best interest to understand how other airports might play into meeting the future needs of the traveling public. At the same time, we are fully cognizant of the importance of protecting both public health and safety near all of the county's airports as well as airport operations.

With that in mind, we are more than glad to provide the assistance you requested. The President/CEO of the Airport Authority, Thella Bowens, will assign our highest level executive with the necessary expertise on these issues to work with the City. She will also identify with City staff a scope of work and appropriate procedural

issues. Ms. Bowens can be contacted at . . .

Bersin's letter was copied to all members of the SDCRAA Board.

### **3. The "Loaned Executive" Agreement for Ted Sexton to Work with the City**

An MOU executed by Thella Bowens for the AA and by Ronne Froman for the City on March 31, 2007 provided for the "Executive Loan of Services of Airport Employee Theodore ("Ted") Sexton." It included broad language concerning Sexton's duties. Attached to the MOU was a 15-item list entitled "Scope of Services." While issues related to the Sunroad building were listed, no specific mention of the Sunroad project appeared in the agreement. Attachment 6, Exhibit 11.

As the AA counsel's Report reflects, AA executives viewed the executive loan to the city as an "operational decision," not a "policy decision," based on Thella Bowens' consultation with legal staff. Consequently, AA Board approval of the executive loan was not sought. Attachment 6, p. 3.

The mayor's office did not advise the city attorney's office of the MOU or seek that office's review or approval. The mayor's office maintains that no such review or approval by the city attorney's office was required. The mayor's office cites two similar pre-existing "loaned executive" agreements with the county and the port district, respectively, which were entered into by the mayor's office without review and approval by the city attorney's office.

On April 11, 2007, less than two weeks after the MOU's approval, AA Chairman Bersin discussed and explained the executive loan agreement at a City Council Rules Committee meeting. The attendees included City Council Member Donna Frye and Chief Deputy City Attorney Catherine Bradley, head of the Business & Government Section in the City Attorney's Office.

Thella Bowens briefed the AA Board on the loaned executive agreement on May 2, 2007. Attachment 6, p. 3.

### **4. Ted Sexton's Work with the City on the Sunroad Building and Other Issues**

Ted Sexton began the "executive loan" on April 1, 2007. He worked with Jim Waring and Jim Barwick, head of Real Estate Assets Department. In April and May, Sexton worked on proposals for making the Sunroad building compliant with FAA regulations. He worked on many other issues affecting city airport operations, including FAA Notification Requirements that were later published. A complete summary of Sexton's work with the city is contained in a memorandum he prepared for the AA's counsel on June 21, 2007. It is included in AA counsel's Report. Attachment 6, Exhibit 12.

With respect to the Sunroad building, the AA counsel's Report detailed Sexton's view of his mission as follows: (1) impress upon the city the significance of the issues implicated by the height of the building and the FAA's concerns; (2) impress upon the city that the FAA was not a paper tiger

and could not be ignored; and (3) address the safety issues, as an aviation expert and former military pilot, while the building remained at 180 feet pending the outcome of the litigation. Pursuant to those mission concerns, Sexton sought to educate city regulators and Sunroad representatives, when asked to attend meetings with city staff, about the serious nature of the Sunroad building height issue as affecting airport operations and FAA safety concerns. Sexton made a presentation jointly to city and Sunroad officials on this specific topic. Attachment 6, p. 4.

Working with city officials, the FAA, and Sunroad representatives, Sexton developed several options for the operation of Montgomery Field in light of the 180-foot height of the Sunroad building. The draft options were circulated to all stakeholders, including city officials, Sunroad representatives, and the FAA prior to any formal presentation to the FAA on behalf of the city. The proposal ultimately called for reducing 86 percent of the Sunroad building to 166.3 feet, leaving 14 percent (the elevator mechanics) at 180 feet and modifying some flight approaches to restore flight safety margins. This was the proposal in Mayor Sanders's May 18 letter to the FAA and CalTrans, which was copied to the city attorney and City Council.

As noted, Sexton was with Jim Barwick at the May 22, 2007 presentation of the city's proposal to the FAA in Fort Worth. Sexton also attended a meeting with city and FAA officials in Los Angeles regarding the flight pattern modification aspect of the proposal, and he attended the May 31 meeting where Mayor Sanders decided that there would be no changes to flight patterns and that the building must come down to 160 feet. Ultimately, the city withdrew the proposal made to the FAA. Attachment 6, pp. 4-5.

#### **5. The Responses of the Mayor and his Office to Questions Regarding Ted Sexton's Role in the Sunroad Building Issue**

On June 6 and 7, 2007, City Attorney Aguirre publicly charged that AA's loan of Sexton to the city had been improper and was solely to aid Sunroad because Feldman was a contributor to the mayor's campaign. A member of the press contacted the mayor's Communications Director, Fred Sainz, on June 7 to inquire about Sexton's role with the city. At the time Sainz did not know of the mayor's March 2 letter to Alan Bersin or Bersin's reply letter of March 12—and would not learn of them until weeks after when a reporter alerted him. Sainz responded to the press inquiry by contacting Ronne Froman, and Froman provided Sainz with various documents, including minutes of meetings with AA staff regarding the city's airport operations generally and the executive loan agreement. Froman evidently did not have the March exchange of letters between the mayor and Bersin, however. Without having spoken beforehand to Waring, Barwick, or Mayor Sanders about the matter, Sainz prepared and on June 7 issued, without consulting the mayor, a "Fact Sheet." It addressed the loaned executive agreement and outlined Sexton's general duties in assisting the city in its determination how best to manage its airports. With respect to the Sunroad building issue, the "Fact Sheet" stated: "Mr. Sexton was not brought on board to manage the Sunroad building issue." Attachment 9.

Later on June 7, Mayor Sanders made one of his regular appearances on the Roger Hedgecock radio program. Sainz believes that he quickly briefed the mayor in advance of the

program concerning Sexton consistent with his "Fact Sheet." When Hedgecock raised a question during the program with the mayor concerning Sexton's role with the city and the Sunroad building issue, the mayor responded to the effect that "Sexton was not brought on with the city to work on Sunroad." When he made the statement, the mayor later explained, he had forgotten his March 2 letter to Bersin, a letter drafted by Waring that was "stuck under his nose" and signed along with scores of other documents regularly submitted for his signature; and he had not recalled Bersin's March 12 reply letter during the radio program either. The mayor subsequently realized that Sexton had played a significant role in assisting the city on the Sunroad matter. At the mayor's next appearance on the Hedgecock program, on June 14, he admitted the error in his statement and corrected it. The mayor stated in his interview with our office that although Sexton had attended meetings with the mayor and other city staff to discuss and brief the mayor on the Sunroad building issue in April and May, he did not really know who Sexton was on sight.

### **C. THE TIMING AND CONTEXT OF THE CITY ATTORNEY'S ACCUSATIONS OF CORRUPTION AGAINST THE MAYOR**

As indicated previously, after the FAA's hazard determination, the Sunroad Centrum 12 project gave rise over time to a sharp split between the city attorney's office and the mayor's office, the principal representative of the latter being Jim Waring as director of DSD. Initially, however, DSD and the city attorney's office worked in coordination on the Sunroad building height issue.

When senior DSD officials first were made aware of the FAA's concerns about the building's height in mid-June 2006, they immediately contacted DSD's attorney in the city attorney's office, DCA David Miller, for advice. Miller, in turn, was in contact with and met with DSD officials and Sunroad's counsel in August and September 2006. In Miller's words, this activity was to "find a way to make the situation safe" and to resolve the matter without litigation. Miller later testified at a hearing in the Thomas Story prosecution that the parties were making progress on resolving the matter.

Miller further testified in the Story case, that in mid-October, 2006, after learning of the Sunroad building situation from Deputy City Attorney Abbe Wolfsheimer Stutz, City Attorney Aguirre called DCA Miller into his office. Miller told the city attorney that progress was being made on resolving the matter by seeing if the FAA would agree to an alternate plan to resolve the hazard determination. However, the city attorney told DCA Miller that the only resolution he was going to accept was the building being taken down, that he did not want Miller to work on any resolution, and that he "would rather hear that [Miller] would take a chainsaw and go up to the building and cut it down." Miller told the city attorney that there were no irregularities or illegalities with respect to how the permits had been issued to Sunroad for the Centrum 12 building. The city attorney responded that somebody had to have done something illegal and asked if somebody at DSD was capable of "taking a bag of money." Miller responded that was both unlikely and unnecessary since no one at DSD would need to take a bribe in order to properly issue the permits.

Shortly thereafter, in mid-October, DCA Miller and, in turn, DCA Carmen Brock, to whom Miller had surrendered his Sunroad file on orders of the city attorney, directed DSD to issue a Stop

Work Order for the building. They asserted that the building was illegal and a nuisance. Waring openly questioned this approach with Miller, Brock and other senior attorneys in the city attorney's office, fearing liability for the city. However, in two weeks' time he complied with the city attorney's direction and directed that an SWO issue for the top two floors of the building. Waring told us that he did not believe that action would prejudice the city because no work was being done then on the building's top two floors.

The city attorney's office discussed with DSD and Sunroad the "weatherization" proposal made by Sunroad in November 2006. As previously noted, however, City Attorney Aguirre sent a memo to Waring telling him not to modify the SWO, i.e., to reject Sunroad's "weatherization" request. Intent on minimizing city liability by resolving the matter with the FAA and allowing the "weatherization" measures to go forward, Waring corresponded with the city attorney's office to urge that the city step back and let CalTrans press the FAA height concerns and state permit compliance issue with Sunroad. Any meaningful relationship between Waring and the city attorney's office concerning the matter ended on December 15, 2006, when Waring e-mailed City Attorney Aguirre and others to dispute the city attorney's tactics, urge a solution with the FAA, and ask City Attorney Aguirre to contact him directly. The city attorney instead sued Sunroad, asserting the building constituted a nuisance. Six days later, on Waring's direction and without further consultation or communication with the city attorney's office, Escobar-Eck modified the SWO to allow the "weatherization" measures.

City Attorney Aguirre publicly charged that Waring was "corrupt" and on January 24, held a press conference to announce that he was calling on the United States Attorney to investigate and "make an aggressive prosecution" of Sunroad representatives and city officials in connection with Centrum 12. Federal authorities made no response. In March, City Attorney Aguirre unveiled his own criminal investigation when he sought and obtained a search warrant for Sunroad's offices to seek evidence of an alleged conspiracy between Sunroad representatives and city officials to violate city lobbying restrictions, but no law enforcement agency would execute the warrant. In April, the city attorney charged Sunroad representative and former city employee, Tom Story, with misdemeanor offenses for violating city lobbying restrictions while working for Sunroad on the Centrum 12 building and other projects. A little over a month later, a superior court judge removed the city attorney's office from the prosecution, finding that the city attorney had personally used the criminal investigation and prosecution to attempt to gain an advantage against Sunroad in the city attorney's civil suit over the building.

By early May, the outcome of the civil litigation to bring down the building remained uncertain and the effort to generate a criminal investigation and prosecution appeared thwarted. City Attorney Aguirre urged Mayor Sanders to settle the dispute with Sunroad so "we could be seen as problem solvers," read the mayor's letter before the May 18 press conference (twice, per Sainz), and stated, "[I]t was great." The city attorney stood with the mayor at the press conference and spoke after the mayor admitted mistakes were made by the city concerning the building and announced his support for the city attorney's lawsuit. Crucially, the mayor also detailed the proposal the city was going to make to the FAA, calling for only a partial removal of the top 17 feet of the building and the rerouting of inclement weather air approaches. As of May 18, it appears that the mayor and the

city attorney were in agreement over dealing with the Sunroad building issue and the city attorney was fully aware of the mayor's proposed course of action. As noted, Ted Sexton and other DSD officials afterward worked with Sunroad and the FAA to refine the proposal modifying the building and rerouting the air approaches and then officially presented the proposal to the FAA.

Four days after the press conference, however, the city attorney held another press conference himself. There, he asserted the mayor refused to fund 17 "supplemental" Deputy City Attorney positions in retaliation for the city attorney's May 15 report in which he criticized the handling of the Sunroad project by the mayor's office. The mayor's office immediately responded with a "Fact Sheet" refuting the city attorney's allegations and accusing the city attorney of mismanaging his own budget processes. Attachment 10.

What was not publicly known was this: In his interview with this office, Fred Sainz stated that about this same time, Executive Assistant City Attorney Donald McGrath met with Fred Sainz of the mayor's office. ACA McGrath suggested that City Attorney Aguirre would "go easy" on the mayor over the Sunroad building matter if the mayor relented on the "supplemental" deputy positions budget issue. Sainz declined. McGrath also told mayoral aide Kris Michell that City Attorney Aguirre would publicly accuse the mayor of being corrupt in connection with the Sunroad building in the absence of a concession on the plan to cut the 17 "supplemental" deputy city attorney positions. Finally, in his statement to this office, Mayor Sanders stated that the city attorney telephoned the mayor and asked for the budget to preserve the 17 "supplemental" positions. The mayor said, "No." The city attorney responded, "It's not going to be pretty," and hung up.

The next day, May 23, City Attorney Aguirre made public accusations against the mayor of corruption in connection with the Sunroad project.

## V.

### **EVALUATION: THE CITY ATTORNEY'S ALLEGATIONS OF CORRUPTION**

#### **A. ALLEGATION: THE MAYOR ALLOWED A CAMPAIGN CONTRIBUTOR TO BUILD IN VIOLATION OF FAA REGULATIONS AND STATE LAW**

City Attorney Aguirre wrote in his Union-Tribune letter to the editor:

Unfortunately, the mayor engaged in an embarrassing and corrupt course of action when he allowed a campaign contributor, who had raised thousands of dollars for the Sanders campaign, to construct a building near the city's airport at Montgomery Field in defiance of Federal Aviation Administration safety standards and California state law.

Because the June 15 letter was the culmination of charges leveled by the city attorney over three weeks, it would be unfair to the accuser, as well as the accused, to focus exclusively on the words of the letter alone. Those words were notable only because, perhaps for the first time, the city attorney actually accused the mayor of being "corrupt." A complete evaluation of the charge must include the full breadth of the allegations leveled by the city attorney in the May 23 and June 6 KUSI morning news programs, the June 7 Airport Authority meeting, and the June 12 press conference. Attachments 11, 14.

The city attorney made the following related allegations on the two news programs, at the Airport Authority meeting on June 7 and at his June 12 press conference, leading up to the letter of June 15:

- Referring to the approval of the "weatherization" measures, the mayor was personally involved and "cut a backroom deal" with the Sunroad people.
- The mayor "allowed" the construction of an "illegal" building which created a "safety issue" "on behalf" of someone (Aaron Feldman) who held a fund raiser for the mayor.
- After meeting with Aaron Feldman on December 19, the mayor authorized the modification of the SWO to permit the "completion of the building."
- Aaron Feldman, a "major contributor" to the mayor, built a building with the mayor's knowledge and assistance in violation of the SWO

and FAA hazard determination.

- “[T]here was no authority for the Mayor to take a position with the FAA to change the landing at the Montgomery Field Airport.”
- “What I’m suggesting here is that there is a very deep, on-going effort to circumvent the legal requirements on behalf of the Mayor’s substantial campaign contributor.”
- “Misuse of public funds to help someone who had violated the FAA laws.”
- “The thing you have to remember is the Mayor’s staff issued the 180-foot permit on July 7th after the presumed Notice of Hazard had been issued on the 24th of April, after Sunroad had represented on June the 20th and again on June 22nd that they would limit it to 160.”
- “A rich campaign contributor who contributes thousands of dollars to the Mayor has been given special treatment by the Mayor and his staff. They were allowed to build the building in defiance of the FAA safety standards. They were allowed to circumvent the stop work order that the city attorney’s office advised had to be put into place.”

## **B. FINDINGS AND EVALUATION**

### **1. The Relationship Between Aaron Feldman and Sunroad and the Mayor and His Staff**

It is impracticable to attempt to identify all those among the numerous contributors to the mayor’s campaign who might have had relationships with Aaron Feldman or might have made contributions at his behest. Our inquiry reflects that Feldman and individuals related to him contributed at minimum \$3,000 to the mayor’s election campaign. In addition, on October 11, 2006, Sunroad Asset Management, Inc. contributed \$10,000 to San Diegans for City Hall Reform. That committee backed Proposition C, a November 2006 ballot measure related to the privatization of municipal operations that was supported by Mayor Sanders. Thus, it is fair to say that Aaron Feldman was a major contributor to the mayor.

As Mayor Sanders and Jim Waring informed us, they were aware that Feldman was a significant contributor during their dealings with Feldman and Sunroad concerning the Centrum 12 building. Fred Sainz, one of the mayor’s principal political advisors, told us that in the mayor’s office there is never any discussion whether a person with an issue before the city is or could be a contributor and that the mayor customarily meets with people from all walks of life and individuals on both sides of an issue of concern to the city. (Sainz advised us that he has never met Aaron Feldman and that before the Centrum 12 building issue arose, he did not know of Feldman or

Sunroad. As general matter, Sainz advised us, he is unaware of whether individuals he deals with on behalf of the mayor are contributors or not.)

According to Mayor Sanders, he met Feldman to discuss the building issue consistent with his practice in all the city's business to meet with individuals on both sides of an issue, whether he agrees or disagrees with the individual's position and regardless whether the individual is a supporter or detractor of his. The mayor advised us that before meeting with Feldman on December 19, 2006, Waring briefed him concerning his dealings with Sunroad and that it did not put Sunroad in a good light. The mayor denied doing favors for Feldman or Sunroad or taking any action because Feldman and Sunroad were contributors.

Waring advised us that when he started working for the mayor in January 2006, he did not know Aaron Feldman or Sunroad. Waring did not have a favorable impression of Feldman and Sunroad and their business practices with respect to the city's regulatory and planning roles. As an example, Waring cited a bitter controversy between Sunroad and SDG&E over the relocation and allocation of costs concerning the SDG&E substation at the New Century project site, a matter in which Waring became involved in Spring 2006 and in which he eventually advised Sunroad that the city would not issue it any discretionary permits for further development until Sunroad settled. Waring stated that he had no reason or motive to assist Sunroad or Feldman. He denied any actions or decisions were taken to assist or favor Feldman or Sunroad because they were contributors to the mayor or otherwise. Waring advised that he urged the mayor to meet with Feldman consistent with the ongoing efforts at the time to attempt a resolution of the FAA hazard determination while minimizing liability for the city.

We found no direct or circumstantial evidence suggesting that the decisions and actions of the mayor, his staff, or other city officials under his direction regarding the Centrum 12 building matter had been motivated by a desire to lend assistance to Feldman or Sunroad Enterprises or that any of those decisions or actions were the result of Feldman's or Sunroad's contributions to the mayor's campaign.

Nor is there any evidence that Feldman's status as a contributor to the mayor provided him special access or undue influence, which may be viewed as a form of "corruption" or the appearance thereof. (See *McConnell v. Federal Election Comm'n* (2003) 540 U.S. 93, 150; *Buckley v. Valeo* (1976) 424 U.S. 1, 27 (per curiam).) On two occasions, the mayor could have taken action to assist Feldman and Sunroad to resolve the FAA hazard determination and maintain the building at 180 feet, as planned and constructed. On both occasions, the mayor refused. First, at the December 19, 2006 meeting, the mayor refused to act on Sunroad counsel's advice as stated by Feldman that the FAA's hazard determination would be resolved if the mayor asked the FAA to make permanent its NOTAM, which raised the minimum inclement weather circling altitude. Second, in late May 2007, the mayor rejected the FAA's offer to allow the building to remain at 180 feet if the inclement weather approaches were shifted to the south of Montgomery Field that would have meant more air traffic over Serra Mesa residential neighborhoods, even though for less than one percent of all landings. Thus, the record refutes the notion that Mayor Sanders intended to aid Feldman and Sunroad as his campaign contributors.

An elected officeholder is neither legally prohibited from meeting nor ethically expected to decline meeting an individual based upon contributions the person makes to the officeholder's political campaign. The sources and amounts of campaign contributions are sharply limited and thoroughly reported in this state. Those limits and reporting requirements combined with measures like the Freedom of Information Act, the Public Records Act, and open meeting laws carve a formidable legal landscape. Armed with access to both governmental deliberations and campaign financial information, an informed public can make its own judgments about the propriety of the actions taken when officeholders deal with contributors and their issues. The fact that an officeholder meets with campaign contributors is not itself a corrupt practice.

## **2. The Mayor's Actions and Decisions Affecting the Construction of the Centrum 12 Building**

In evaluating the charge of corruption, the mayor's actions with respect to Centrum 12 must be judged from the perspective of this fact: the mayor learned of the FAA's hazard determination fully two months after the building had reached its permitted height. The Centrum 12 building had been proposed at 180 feet and had been permitted at that height. Most of that permit process occurred prior to the mayor assuming office and without the mayor's knowledge or Waring's knowledge.

It is false to assert that the mayor "allowed" Sunroad to construct an illegal building which endangered public safety. The construction was properly and legally permitted by the city's established process. DCA Miller testified he so informed City Attorney Aguirre in October 2006. Before the city issued its final permit for interior construction, Sunroad had agreed to comply with FAA regulations and hold the building to 160 feet. The FAA issued a permit for a 330-foot crane to construct the building to its permitted height and a NOTAM to route air traffic safely above the crane. It was up to Sunroad, not the city, to apply to the FAA pursuant to the 14 C.F.R. Part 77 regulations, and, if necessary, to apply to CalTrans for a permit pursuant to the Public Utilities Act. The building as topped out did not endanger public safety because the FAA would have closed Montgomery Field to air traffic if it had. We find no evidence of corruption or unethical behavior in the permitting process undertaken by the city.

Waring did not trust the city attorney's office's advice that the building was an illegal nuisance and that the city, as opposed to the FAA or CalTrans, had a duty to abate it. Waring was not given a clear and direct legal opinion from the city attorney's office that there would not be city liability. Four different DCA's had come and gone as legal advisors to Waring's city departments in the first six months of his tenure. The city attorney's office had besieged DSD staff for the production of documents and interviews by December 2006. By January, 2007, the city attorney had publicly accused Waring of being "corrupt" and had publicly announced that he was requesting a federal criminal investigation of Sunroad and DSD officials.

Waring advised us that when he became aware of the FAA determination he conducted research into the FAA regulations and learned that the Part 77 regulations were not "law," but guidelines or "standards for determining obstructions in navigable airspace." (14 C.F.R. Part 77, sec.

77.1(a.) Waring spoke directly with FAA officials who advised Waring that hundreds of buildings in the nation violate the Part 77 regulations and that the FAA cannot enforce the regulations by making land use directions. Waring was told that only two buildings had been modified to comply with the Part 77 regulations, one of them the FAA's own building in Atlanta, Georgia. He was told that the FAA for its part would not tell the city what to do, that it only makes hazard determinations and will shut down an airport if safety is compromised by a structure or condition. The FAA did not undertake such action in this case because it had issued the NOTAM to accommodate the construction crane, and thus the Centrum 12 building was not a "safety issue."

Marcela Escobar-Eck corroborated Waring's conclusions. She informed us based on her extensive experience in development and land use regulation that the FAA commonly "overrides" strict compliance with Part 77 regulations. A contemporaneous local example is the La Jolla Commons Project in the University Town Center area. Escobar-Eck pointed out to us that many downtown buildings in San Diego technically violate the Part 77 regulations, but are accommodated by the approved FAA air routes for Lindbergh Field.

Waring's concern was that action by the city contrary to Sunroad's building permit such as the issuance of an SWO or a Restoration and Mitigation order to reduce the building to 160 feet would subject the city to civil liability. The question posed by the mayor's staff to the city attorney's office reduced to this: if the city lawfully issued a permit to Sunroad to build to 180 feet, what was the legality of revoking or modifying the permit and requiring deconstruction of the 180-foot building on the basis of the FAA's Part 77 regulations? Waring could not obtain an opinion on that question from the city attorney. Likewise, Waring was unable to induce CalTrans to enforce its own position that the building violated state law or to provide a legal opinion on the matter. Waring concluded that Sunroad itself would have to settle matters with the FAA and CalTrans, without the city forcing its hand, because Sunroad would have a problem obtaining insurance and tenants in light of the FAA hazard determination. For that reason, Waring resisted issuing the SWO, agreed to Sunroad's "weatherization" measures, and sought to reach a resolution which would satisfy the FAA, while avoiding liability for the city. In Waring's view, the city attorney's suit against Sunroad converted Sunroad's practical problem into potential civil liability for the city. We find that regardless of the practical or strategic merit of that position and the course of action he pursued as a result thereof, Waring had a reasonable basis for his position and pursued it in good faith in order to avert or minimize the city's potential civil liability and not as a favor to Sunroad or Aaron Feldman.

We also find, however, that there was not unanimity with respect to handling the Sunroad building issue in the mayor's office. Fred Sainz, the mayor's political and media advisor, told us that he was convinced the building was illegal based on the correspondence from CalTrans and that he urged the mayor and Waring to support the city attorney's effort to force Sunroad to lower the building to 160 feet. Part of Sainz's concern was how the matter would appear to the press and public.

Mayor Sanders told us that he was well aware of Waring's and Sainz's opposing positions. He readily articulated the bases of these positions and characterized them as "vehemently" opposed.

The mayor told us that he was genuinely concerned that the city would have civil liability if it sought to force Sunroad to deconstruct the building contrary to the city's permit and that he could not get objective legal advice from the city attorney's office on that issue. The mayor advised us that he sided with Waring and endorsed his handling of the matter because he believed it was sound policy even though he knew it might not play well politically.

With respect to Sunroad's proposed "weatherization" measures, the mayor was aware of Waring and Escobar-Eck's rationale for approval of them. He did not play any direct role in the matter, but concedes responsibility for the decisions. As detailed in the Findings (Part IV), Waring approved the measures after consulting with Escobar-Eck because he was concerned that the October 2006 SWO preventing Sunroad from working on the top 20 feet of the building to seal the building against the elements could result in civil liability for the city for any weather-caused damage. Waring told us that he was concerned "one day the city could own that building" and did not want a building with weather damage. Escobar-Eck consulted with city building officials Hasenin and Harris who agreed that the proposed measures were reasonable to insure against weather damage. The city's letter to Sunroad to permit the "weatherization" measures was explicit that any construction undertaken by Sunroad was at its own risk and without any claim against the city. We find that regardless of the practical or strategic merit in permitting the "weatherization" measures, Waring and Escobar-Eck had a reasonable and good faith belief that the action was in the city's best interest to minimize potential civil liability and that they were not doing a favor for Sunroad or Aaron Feldman.

The proposal to the FAA and CalTrans addressed in the mayor's May 18, 2007 letter to modify the building and to change some inclement weather approach patterns was, as previously noted, personally reviewed and approved by the city attorney. The mayor's proposal was an open and direct effort on his part to satisfy the FAA safety concerns and eliminate any potential liability of the city. The FAA countered that the Sunroad building could remain at 180 feet if all alternate air traffic patterns were diverted to the south of Montgomery Field over the Serra Mesa residential neighborhood. The mayor rejected the proposal and decided instead that the building had to be reduced to 160 feet. The mayor so directed on June 21, 2007. We find no evidence that the mayor made his proposal to the FAA as a favor for Sunroad or Aaron Feldman.

We make the following conclusions with respect to the city attorney's specific allegations concerning the mayor and his office acting to favor campaign contributor Aaron Feldman and Sunroad Enterprises:

- Accusation: Referring to the approval of the "weatherization" measures, the mayor was personally involved and "cut a backroom deal" with the Sunroad people and after meeting with Aaron Feldman on December 19, the mayor authorized the modification of the SWO to permit "completion of the building," and Aaron Feldman, a "major contributor" to the mayor's campaign, built a building with the mayor's knowledge and assistance in violation of the SWO and FAA hazard determination.

The “weatherization” measures were not mentioned at the December 19 meeting between the mayor and Aaron Feldman. The mayor was not “personally involved” in approving those “measures,” albeit he takes responsibility for the decision of Waring and Escobar-Eck. There was no “back room deal”; rather, Waring and Escobar-Eck vetted the proposal through the city’s building officials. They agreed that it was a reasonable request to protect the building. Approval of the proposal did not allow Sunroad to “complete the building.” The measures did not violate the SWO because the approval issued by the Escobar-Eck modified the SWO. The measures did not violate the FAA hazard determination because it was concerned exclusively with the height of the building.

- Accusation: The mayor “allowed” the construction of an “illegal” building which created a “safety issue” “on behalf” of Aaron Feldman who held a fund raiser for the mayor. “A rich campaign contributor who contributes thousands of dollars to the Mayor has been given special treatment by the Mayor and his staff. They were allowed to build the building in defiance of the FAA standards. They were allowed to circumvent the stop work order that the city attorney’s office advised had to be put in place.”

The mayor did not allow the construction of an illegal building which was a safety issue. The building was properly permitted and had been constructed to the height which caused the FAA hazard determination before the mayor knew about the problem with the building. The goal of the mayor and his staff in taking action after learning of the FAA hazard determination was satisfying the FAA hazard finding and thereby eliminating the safety issue” as well as minimizing or eliminating potential liability to the city. None of the actions were taken on behalf of Aaron Feldman or Sunroad. On two occasions when the mayor could have acted to assist Feldman and Sunroad (in December 2006 and May 2007), the mayor refused to do so.

- Accusation: “[T]here was absolutely no authority for the Mayor to take a position with the FAA to change the landing [patterns] at Montgomery Field Airport.”

Only the city as owner and operator of its airport could approach the FAA regarding the modification of aboveground operations. The mayor had the authority to make this proposal to the FAA. He disclosed to the city attorney, the City Council, and the public his intention to do so in advance.

- Accusation: “What I am suggesting here is that there is a very deep, on-going effort to circumvent the legal requirements on behalf of the Mayor’s substantial campaign contributor.”

There was no effort by the mayor, his staff or DSD to “circumvent legal requirements.” The efforts by the mayor and his staff after they learned of the FAA hazard determination were intended to achieve a resolution that would satisfy the FAA and eliminate the hazard determination in conformity with the law, while minimizing or eliminating city liability.

- Accusation: “Misuse of public funds [referring to Sexton’s work] to help someone who had violated FAA laws.”

Sexton was employed in an effort to find a resolution to satisfy the FAA’s safety concerns. As the airport belongs to the city, only it had the authority or ability to approach the FAA with the proposal made by it. Sexton’s actions were on behalf of the city, not Feldman or Sunroad. His employment did not constitute a misuse of public funds. (The Airport Authority Report reaches the same conclusion. Attachment 5, p. 6.)

- Accusation: “The thing you have to remember is the Mayor’s staff issued the 180-foot permit on July 7th after the presumed Notice of Hazard had been issued on the 24th of April, after Sunroad had represented on June 20th and again in June 22nd that they would limit it to 160.”

The mayor’s staff did not issue the permit on July 7. It was issued by DSD, before the mayor and his staff were aware of the problem with the Sunroad building. The permit issued on July 7 was for interior construction and had nothing to do with permitting the building to be built to 180 feet. That had been permitted in February 2006, long before the FAA hazard determination. The July 7 permit issued after Sunroad represented to the FAA and to the city that it would not build above 160 feet in conformance with the Part 77 regulations. There was no legal reason for the city not to issue the interior construction permit.

Applying the law to these factual findings, there is no basis to conclude that the handling of the Sunroad Centrum 12 building or the dealings with Sunroad Enterprises or Aaron Feldman by the mayor, his staff, or DSD was corrupt. The facts do not reflect even the relatively low level of probable cause for a belief that a violation of a statute involving corruption—e.g., bribery, conflict of interest, misuse of government funds or a breach of applicable municipal ethics ordinances—had occurred. The facts do not support a reasonable suspicion of “a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to, or to some other person (“corruptly” as defined by the Pen. Code, § 7 subd. (3)). The facts do not support a conclusion that Sunroad Enterprises or Aaron Feldman had “special access” or enjoyed “undue influence” with the mayor, his staff, or DSD officials.

**C. ALLEGATION: THE MAYOR MISUSED PUBLIC FUNDS BY HAVING TED SEXTON LOBBY THE FAA ON SUNROAD'S BEHALF FOR THE BENEFIT OF A CAMPAIGN CONTRIBUTOR**

City Attorney Aguirre wrote in his Union-Tribune letter to the editor:

Moreover, the mayor engaged in a corrupt and embarrassing course of action when he deployed the 'highest level executive with the necessary expertise on these issues' from the San Diego Regional Airport Authority, along with city staff, to lobby the FAA for changes to the routing of airplanes at Montgomery Field so that the illegal building could remain. In doing so, Mayor Sanders misused thousands of dollars of public funds for the private benefit of a campaign contributor.

Prior to this allegation in the letter to the editor, the city attorney made the following related allegations at the June 7 Airport Authority meeting and at his June 12 press conference—Attachments 11,14:

- Without public notice or discussion, the mayor, with the assistance of AA Chairman Bersin, sent Ted Sexton to work on changing the landing patterns to the south of Montgomery Field to accommodate a substantial campaign contributor of the mayor.
- Sexton was used to help the mayor's campaign contributor circumvent FAA requirements and Sexton was "lobbying" the FAA.
- "They [Sunroad Enterprises and Aaron Feldman] were given the benefit of a secret agreement with the Airport Authority; the misuse of an airport authority employee to try to circumvent the FAA requirements; the misuse of city funds to pay for the travel of that employee . . . ."

**D. FINDINGS AND EVALUATION**

**1. The Origin and Execution of the "Loaned Executive" Agreement**

The "executive loan" agreement of Ted Sexton from the AA to the city to work on airport matters had its origins in discussions at the outset of the Sanders administration. Those discussions concerned both how and whether the city ought to manage its airports. A number of meetings took place between city and AA officials between March 2006 and February 2007 at which the participants discussed the idea of a "loaned executive" assisting the city in handling its airport operations and relationship with the FAA.

On March 2, 2007 Mayor Sanders sent a letter, authored by Jim Waring, to Alan Bersin, chairman of the AA, requesting AA's assistance with the Sunroad building issue. The mayor's letter

did not contain a request for a “loaned executive.” It requested that “the Airport Authority assist us in analyzing the situation [concerning the Sunroad building] and in working with the FAA and other interested stakeholders in an attempt to resolve the issue.” After consulting with the AA’s legal department, Chairman Bersin replied in a letter on March 12, which offered the loan of “our highest level executive with the necessary expertise on these issues to work with the City.” The “issues” mentioned in Bersin’s letter did not specifically address the Sunroad building issue. That letter instead spoke to the “best approaches” for the city’s airport uses, user needs, and public health and safety near the airports. As the Airport Authority Report notes, “Ted Sexton was the logical choice to provide the expertise needed by the City.” Attachment 6, p. 18.

On March 31, 2007, an MOU was executed by AA CEO Thella Bowens and city COO Ronne Froman, for the “executive loan” of Ted Sexton from the AA to the city. The MOU described a wide range of duties for Sexton. None of the duty descriptions specifically referenced the Sunroad building issue, but they did touch on issues related to that matter.

As the AA counsel’s Report details, the formation and execution of the agreement was “operational” and did not require full AA board approval. Nonetheless, the board was advised of the agreement. Attachment 6, p. 3. For the city’s part, the mayor’s office contends, contrary to the city attorney’s assertion, that the agreement did not require the approval of the City Council or the city attorney’s office as it did not require the expenditure of city funds and was an agreement for executive assistance the mayor’s office was competent to make. In support of this claim, the mayor’s office pointed to similar “loaned executive” agreements reached by the city with the county and the harbor district, both of which were negotiated and executed exclusively within the mayor’s office. We find that regardless of whether the “loaned executive” agreement, as a matter of internal municipal procedures, should have been approved by the City Council or the city attorney, the fact it was not does not suggest “corruption” in connection with the origin or execution of the agreement.

As to the allegation that the “loaned executive agreement” was in some manner or degree “secret,” the fact that City Attorney Aguirre was not made aware of the agreement at the time it was executed did not make it secret. As detailed in the Findings, AA Chairman Bersin discussed the “loaned executive” agreement at a City Council Rules Committee meeting on April 11. Present at the meeting were City Council Member Donna Frye and Chief Deputy City Attorney Catherine Bradley, the head of the city attorney office’s government section. The city attorney has responded to this fact by asserting that the discussion in the City Council of the “loaned executive” agreement for Ted Sexton “was never noticed on the agenda discussion.” Attachment 12, p. 4. It is difficult to understand how the absence of the issue on the agenda matters to the charge of a corrupt course of conduct. We conclude that the fact that the agreement was openly discussed by the chairman of the AA at the City Council committee hearing only days after it was executed undermines the suggestion that the agreement was secret or that the city attorney’s office was not made aware of it.

## **2. Ted Sexton’s Work on the Sunroad Building Matter**

As detailed in the Findings, Ted Sexton worked with a broad mandate under the MOU to assist the city with a host of issues related to its operation of city airports. He worked on a number

of issues wholly unrelated to the Sunroad building. Attachment 6, Exhibit 12. Sexton did work with city managers and regulators on the Sunroad building issue, most specifically in the effort to address and resolve the FAA hazard determination.

The city attorney's allegations focus on Sexton's activities following the mayor's open letter of May 18, setting forth the proposal to address the FAA's hazard determination. Attachment 12, p. 2. As detailed in the Airport Authority's Report, Sexton had made presentations to city officials and later to city and Sunroad officials in which he emphasized the seriousness of the FAA hazard determination and the need to address it. He worked on a proposal to resolve the FAA height concerns. In part due to that work, the mayor's open letter of May 18 proposed to the FAA and CalTrans lowering part of the building to 163 feet, keeping the equipment enclosure (15 percent of the roof line) at 180 feet and modifying circling instrument approaches.

In the days following the mayor's letter, Sexton continued to work with city and Sunroad officials to refine a power point demonstrating the mayor's proposal for a presentation to the FAA. At the May 22 meeting in Fort Worth, Texas, where Sexton and Jim Barwick presented the city's proposal, FAA officials were mildly supportive, but since it entailed alteration of flight approaches, the FAA suggested the matter be vetted with FAA officials in the FAA's Los Angeles regional office. Sexton and Barwick later met with the FAA in Los Angeles. While the proposal was under consideration, the city withdrew the proposal.

The mayor's May 18 proposal to the FAA was an open matter disclosed to the City Council and the public. The city attorney had been made aware of the proposal and approved. The fact that the mayor would follow up his written proposal with a formal, documented presentation to the FAA should hardly be surprising. Sexton was the most appropriate resource available to the city to assist in this presentation. We find no basis for the city attorney's claims of impropriety or "corruption" regarding the use of Sexton in this regard.

Neither Sexton nor Barwick were "lobbying" the FAA on behalf of Sunroad or Aaron Feldman in the presentations. They presented to the FAA the *city's* proposal which the mayor had openly disclosed before the meetings. Only the city, as the owner-operator of the airport, could make such a proposal to the FAA. The proposal was not designed to "circumvent FAA requirements." The proposal was intended to meet and satisfy the FAA's concerns underling the "hazard determination." The proposal was not designed to benefit Sunroad. It required Sunroad to make substantial, costly modifications to the building. The proposal was designed to resolve the building's height issue with the FAA and eliminate all liability of the city arising from the costs of the required modifications to the building's height and roof line, the cost of which Sunroad would bear. There was no misuse of public funds in the use of Sexton (or other city personnel or resources) in presenting the mayor's proposal to the FAA.

Under Penal Code section 424, a public official charged with authority over public moneys (and public resources such as employees and equipment [see *People v. Sperl* (1976) 54 Cal.App.3d 640]), who "without authority of law, appropriate[s] the same, or any portion thereof, to his own use, or to the use of another," commits a felony. No evidence reflects the use of Ted Sexton in

connection with the Sunroad building matter and the presentation of the mayor's proposal to the FAA was an appropriation of public money (or personnel or resources) without authority of law and for the use of another. The mayor clearly had the authority to make his proposal to the FAA (indeed, the city attorney reviewed and agreed to it). The proposal was a city matter done for an official purpose. We conclude that the use of Sexton to assist in presenting the city's proposal to the FAA did not constitute misappropriation of public funds.

**E. ALLEGATION: THE MAYOR ENGAGED IN A COVER-UP REGARDING SEXTON'S ROLE WITH THE CITY REGARDING THE SUNROAD BUILDING**

City Attorney Aguirre wrote in his Union-Tribune letter to the editor:

When the facts of the mayor's misconduct began to leak out to the public, the mayor engaged in a campaign of delay, deny and deceive.

The mayor delayed turning over pertinent documents for weeks. He denied that he was helping his campaign contributor to circumvent FAA rules. And he deceived by claiming 'nothing could be further from the truth' in response to allegations he was misusing an Airport Authority senior staffer to lobby the FAA to allow the illegal building to stay.

Prior to this allegation in the letter to the editor, the city attorney made the following related allegations at his June 12 press conference—Attachments 11, 14:

- "In addition, you might recall on May the 30th, the mayor, in response to a demand for any documents associated with Sunroad, produced a series of documents to the city attorney's office which have now been made available, in part, to the media. Not produced by the mayor at that time was a March 2, 2007 letter [from the Mayor to AA Chairman Bersin]. This letter was not released on May 30th when the mayor represented that he had released all the documents associated with Sunroad to the city attorney's office based upon our demand."
- "[P]roviding of false information to the media regarding the matter; and failure to disclose the other documents relating to this. And now we have the disappearance of Mr. Sexton."
- "[T]he Mayor tells the news media that Sexton 'was not brought on to manage the Sunroad building issue,'" citing the June 7 Fact Sheet.
- "Mayor Jerry Sanders, however, failed to disclose [in connection with the press conference and letter of May 18] that City staff and loaned executive Sexton were days away from presenting to the FAA in Texas a flight modification proposal that Sunroad had been advocating."

- “The Mayor has never informed the public or news media that Sunroad officials have been involved in the presentation to the FAA.”
- “[T]he Mayor knowingly withheld essential facts at this news conference [presumably on June 7]. He never disclosed that a presentation had been made to the FAA by Ted Sexton and City Official Jim Barwick in Ft. Worth, Texas on May 22, 2007 regarding flight pattern modifications and Sunroad Centrum I [*sic*] building modifications, as well as that the FAA had refused to support such a plan.”
- “June 11, 2007, Mayor’s memorandum to the City Council regarding the Centrum 12 Office Building Update. The memo states that Sexton and the Mayor’s staff had met with FAA officials to ‘discuss the various options that would be available to the city.’ In addition, the memo also reveals that the FAA ‘told the city’s representatives that it would not support any intrusion into the airspace above 160 feet.’” and “[t]he Mayor’s memorandum was released at the same time the city attorney received the requested documents related to Sexton.”

## **F. FINDINGS AND EVALUATION**

The city attorney’s allegations that “the mayor engaged in a campaign of delay, deny and deceive,” i.e., engaged in a cover-up, inextricably are tied to the city attorney’s allegations that the mayor and his staff took corrupt actions respecting Centrum 12, Sunroad Enterprises, Aaron Feldman and Ted Sexton. Indeed, the cover-up allegation explicitly alleges corruption. We do not find evidence of corruption in those actions by the mayor and the staff. The mayor and his staff certainly believe they engaged in no corrupt conduct. There appears to have been no motive for a cover-up.

The cover-up allegation may reflect a view that the city attorney and, perhaps, the public were entitled to contemporaneous disclosure of all the mayor’s actions with respect to the Sunroad building issue and that a cover-up is signaled in its absence. If so, we find no support in the law for that view. Certain documents may not have been released as quickly as the city attorney desired. Nonetheless, it appears that all relevant documents had been released within a matter of days. The mayor has denied to us that he intended to withhold or delay the release of documents and affirmed that his view was “there was nothing to hide.” We find no evidence of an intentional cover-up by the mayor or his staff.

### **1. The Mayor’s Response to Questions Regarding the Role of Ted Sexton Concerning the Sunroad Building**

On June 7, in the midst of the city attorney’s accusations against the mayor, a member of the press (likely Fred Lewis of the Voice of San Diego) asked the mayor’s spokesman, Fred Sainz, about Sexton’s role respecting the Centrum 12 building. Attachment 13. Unaware of the March letters between the mayor and Bersin, Sainz contacted Ronne Froman, who signed the MOU for the Sexton executive loan on behalf of the city. Froman provided Sainz with various documents concerning that

agreement, none of which directly refer to the Sunroad building issue. Using these documents, Sainz prepared a Fact Sheet which he released to the press. Attachment 9. In pertinent part, the Fact Sheet stated, "Mr. Sexton was not brought on board to manage the Sunroad building issue." Later that day, Sainz briefed the mayor in advance of his weekly appearance on the Roger Hedgecock radio program, and the mayor made a similar statement about Sexton in response to a question from the host. On the following week's show, the mayor corrected the record.

The mayor explained to us that at the time he had forgotten the March letter exchange with the Airport Authority and that, while he was aware Sexton worked on the Sunroad building issue, he thought (correctly) Sexton was working on a range of issues related to the city's airport operations. The mayor stated that he had no intention of misleading the press or public about Sexton's role or his work with the city on the Sunroad building or otherwise, and that he, in fact, did not view Sexton as "managing" the Sunroad issue, but rather as a resource to assist in dealing with the FAA.

On its face, the Fact Sheet and the mayor's statements that Sexton was not brought on board "to manage the Sunroad building issue" were accurate. Sexton, an aviation executive and an expert resource on the city's airport issues, clearly was not "managing" the Centrum 12 building problem, which was Waring's role. The Fact Sheet and the mayor's statements on the radio program might be criticized for failing to mention Sexton's considerable work on developing the city's proposal to address the FAA concerns about the building. However, based on all the facts, there is no evidence that the mayor or his staff deliberately misled the press concerning Sexton's role or made an effort to cover-up the work Sexton had performed in connection with that issue.

## **2. Ted Sexton's Role in the Presentation to the FAA and the Release of Documents Related to Those Activities**

Many of City Attorney Aguirre's allegations of a cover-up concern the mayor's failure to announce in advance or contemporaneously the presentations to the FAA in late May and the delay or failure of the mayor to release documents in response to a Charter section 40 demand that the city attorney had apparently made of the mayor's office concerning the Centrum 12 building. From the city attorney's comments on June 12, it appears that the mayor's office released a host of documents on May 30. However, according to the city attorney, the mayor's office had failed to release the Mayor's March 2 letter to the Airport Authority and perhaps other documents related to the presentation made to the FAA between May 22 and May 30, which City Attorney Aguirre had acquired by the time of his June 12 press conference.

Because the city attorney refused to cooperate with our inquiry, we lack an accounting of which documents he sought and received from the mayor's office on May 30 or how he acquired all of the documents by June 12. The mayor advised us that he and his staff attempted to comply with the city attorney's demand for documents and did not deliberately withhold any documents, because "there was nothing to hide." There was nothing improper about Sexton working on the Sunroad issue generally and nothing amiss or secret in the fact of the presentations Sexton and Barwick made to the FAA in the last two weeks of May.

The mayor's letter on May 18 openly announced that "my staff has put forward a proposal that will reduce the building height to 163 feet. . . ." Nothing overtly alarming, hidden or improper appears in Sexton's and Barwick's working with Sunroad to perfect a proposal that required significant concessions by Sunroad or in their presenting that proposal to the FAA. Likewise, nothing legally compelled the mayor to advise the city attorney, the press, or the public day-by-day and up-to-the-minute what measures his office took to place the proposal before the FAA. The mayor had publicly announced, with the apparent concurrence of the city attorney, that he and "his staff" would make a compromise proposal to the FAA to resolve the FAA height concerns regarding the Sunroad building. For present purposes, how the mayor and his staff went about that in the days following is of little moment. From the record, it appears that the mayor had publicly outlined those efforts by June 11. All documents related to these measures were in the city attorney's hands by June 12, less than three weeks after the events occurred and while the mayor worked out his ultimate response to the Sunroad building issue.

We conclude that the mayor and his office did not deliberately withhold documents to cover-up post-May 18 actions on the Centrum 12 issue or to conceal Ted Sexton's role regarding that issue. The mayor's denial of helping Aaron Feldman and Sunroad Enterprises to circumvent FAA rules appears accurate in that the mayor's post-May 18 actions sought to bring the building into conformity with the FAA rules and eliminate civil liability of the city. The mayor's denial of "misusing" Sexton "to lobby the FAA to allow the illegal building to stay" appears accurate as Sexton was not misused, there was no lobbying by Sexton, and the mayor's effort were directed toward making the building legal under FAA rules.